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AN INTRODUCTION TO VICE

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This symposium is about the legal response to drug abuse, gambling, pornography, and sex outside of marriage. "Vice" is commonly used as a generic term for these activities; the police vice squads concern themselves primarily with these matters, for example. One feature that distinguishes vice crimes from other concerns of the criminal law is their allure: In Jerome Skolnick's words, vice "implies pleasure and popularity, as well as wickedness."¹

The vices addressed in this symposium are as old as civilization, yet they are of intense modern day concern. Some of the most prominent news stories of 1987 were about vice: illicit sex by a presidential candidate, and by a television preacher; marijuana use by a nominee to the Supreme Court; cocaine dealing by Wall Street brokers; and the growth of commercial gambling through the state lotteries. Above all, there was the AIDS epidemic, claiming 50,000 victims in the United States and spreading rapidly due primarily to homosexual promiscuity and junkies sharing needles. This symposium does not lack for motivation or vivid points of reference.

The twelve articles and one note in this issue of *Law and Contemporary Problems* have been grouped under four topics, and these topics will also be used to organize this introduction. One of the interesting aspects of this collection, however, is that most of the articles include commentary on two or more of these topics. The interplay of ideas reflects the fact that preliminary drafts of these papers were presented and discussed at a conference of the authors; the subsequent revisions owe something to the vigorous exchange at this conference.

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1. Skolnick, *The Social Transformation of Vice*, LAW & CONTEMP. PROBS., Winter 1988, at 9, 10.

I

PUBLIC OPINION AND POLITICS

Jerome Skolnick's focus is on the "social transformation of vice"²—the social process by which public concern about a particular vice waxes and wanes from one decade to the next. Perhaps the most prominent example in U.S. history is drinking, which has gone through several profound transformations.³ In recent decades, we have experienced Prohibition, Repeal, and the alcoholism movement (which asserts the view that alcohol abuse is properly seen as a medical problem). Most recently, there has been a resurgence of the belief that alcohol is a dangerous substance, and that commerce in alcoholic beverages should be more closely regulated.⁴ Skolnick focuses on the historical transformations in the public view of gambling. A majority of states now offer a lottery and actively encourage the public to gamble in this way, whereas before 1964 every state prohibited lotteries. This change is the most recent swing of the pendulum.

If public attitudes towards vice are subject to large changes over time, they are also characterized by lack of consensus at any point in time, and ambivalence on the part of many individuals. John McConahay picks up this theme in introducing his article on pornography: "Pornography is a contemporary problem for a small but intense minority of Americans, . . . something to be enjoyed by a larger, less intense minority, and a matter of ambivalence for most Americans."⁵

The instabilities and disparities in public opinion may reflect in part the disparity and drift in basic cultural values, but also the public perceptions of how the particular characteristics of a vice map onto these values. Modern arguments for suppressing pornography, for example, are based on an assertion that pornography threatens to undermine basic values that support family life and respect for women. The difference between this type of "consequentialist" argument and an assertion that pornography is simply immoral, is that the consequentialist position is in the form of an empirical assertion, and in principle at least, could be tested. In fact, as illustrated by McConahay, the scientific evidence on the effects of pornography is ambiguous in most respects. Indeed, with the obvious exception of sexually transmitted diseases, it is generally true that clear-cut evidence on the most important claimed consequences of vice is lacking.

The politics of vice, according to both McConahay and Skolnick, is largely "symbolic." The intensity of the politics of pornography or drug abuse is not the result of well-defined and clear-cut self-interest. Taking a political stance

2. *Id.*

3. See Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview*, in *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 127ff. (M. Moore & D. Gerstein eds. 1981).

4. See D. BEAUCHAMP, *BEYOND ALCOHOLISM: ALCOHOL AND PUBLIC HEALTH POLICY* 152 (1980).

5. McConahay, *Pornography: The Symbolic Politics of Fantasy*, *LAW & CONTEMP. PROBS.*, Winter 1988, at 31, 32.

on these matters symbolizes the importance of the basic values threatened by such vices. Issues such as these do not lend themselves to compromise or rational debate. The advocates for tolerance battle the advocates of suppression. Interestingly, the legislation or court rulings that emerge from this combative process may shape the next generation's attitudes toward the activity in question. A notable example is abortion on demand, which has gained broad acceptance in the years since *Roe v. Wade*⁶ forced a new nationwide policy. At the time of the *Roe* decision, abortion on demand was supported by only fifteen percent of the adult public.⁷

II

HARM

The consequentialist justification for public action to suppress an activity is that it has harmful effects. Katharine Bartlett argues that McConahay has failed to consider one of the harmful consequences of pornography—that it “states the terms upon which men relate to women, terms of domination by subject (male) to object (female).”⁸ The consequence is to affirm norms that are unacceptable to Bartlett and other feminists who demand a broader definition of harm than is reflected in McConahay's account.

Carl Schneider's essay⁹ also focuses on sex, but from the more traditional perspective of family law. He notes the substantial overlap between family law and such vices as polygamy, incest, fornication, prostitution, contraception, adolescent sex, and deviance. These activities are harmful to the extent they undermine the family's capacity to accomplish its central social responsibilities: educating and developing character in children. Criminal statutes banning sex outside of marriage may provide support for an ethic of responsibility in family relationships. Preserving this ethic is arguably a “compelling state interest” that should be given weight in analyzing fourteenth amendment privacy issues. Schneider thus argues that the right to privacy should not be extended to protect sex outside of marriage; while the harm caused by such activity is not necessarily immediate and specific, it may be very great nonetheless and therefore render state regulation constitutionally acceptable.

The articles by Bartlett and Schneider suggest the difficulty in defining and demonstrating the harms caused by illicit sex and pornography. Nevertheless, the question of harm is the central issue in justifying the use of the criminal law, according to David A.J. Richards.¹⁰ John Stuart Mill's “harm

6. 410 U.S. 113 (1973).

7. Kaplan, *Abortion as a Vice Crime: A “What If” Story*, LAW & CONTEMP. PROBS., Winter 1988, at 151, 153.

8. Bartlett, *Porno-Symbolism: A Response to Professor McConahay*, LAW & CONTEMP. PROBS., Winter 1988, at 71, 71.

9. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, LAW & CONTEMP. PROBS., Winter 1988, at 79.

10. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, LAW & CONTEMP. PROBS., Winter 1988, at 123.

principle"¹¹—that the coercive power of the state should only be imposed for acts causing harms to other persons—is consonant with the Founders' liberal vision that is embodied in the Constitution. Richards rejects Mill's utilitarian argument supporting the harm principle, and suggests an alternative: the right of autonomy, or "self-governing moral independence," which is essential to protect against sectarian moral dicta.

III

CRIMINALIZATION

Even if a particular vice passes the test posed by the harm principle, it is not necessarily true that deploying the criminal law against this activity will make things better. Criminalizing a vice has costly consequences, and may prove ineffective in reducing its prevalence.

John Kaplan notes that vice involves consensual activity, and that vice transactions do not ordinarily produce a clear victim who would be motivated to assist the police.¹² As a result, these crimes rarely result in an arrest and successful prosecution, and such arrests as do occur result from expensive and intrusive means of investigation. Kaplan considers the particular case of abortion. (Depending on one's definition of vice, abortion is or is not a vice crime; in either case, it is in functional terms strikingly similar to those crimes which are undeniably vice.) Kaplan predicts that if *Roe v. Wade*¹³ were reversed by some future Court, the effect on the number of abortions would be slight. The states that recriminalized abortion would find it very difficult to enforce the law.

D.J. West asserts that the criminalization of homosexual activity also has been largely ineffective.¹⁴ The legalization of such activity in Europe has disproved the "floodgate theory"; there is evidence that "the incidence and development of primary homosexuality is largely independent of legal pressures."¹⁵ West gives an eloquent statement of the harms of such criminalization:

It is morally wrong, unnecessarily harsh, and practicably unattainable to use the criminal law to suppress all homosexual relationships. Criminalization drives the problem underground, discouraging rational discussion. It forces many into pretense, leaving them vulnerable to blackmail, discrimination, and exploitation. Criminalization alienates homosexuals from mainstream values, unnecessarily diminishing their potential for contributing to society.¹⁶

11. See Mill, *On Liberty*, 187-203, 271-319, in *THE PHILOSOPHY OF JOHN STUART MILL* 185-319 (M. Cohen ed. 1961).

12. Kaplan, *supra* note 7, at 152.

13. 410 U.S. 113 (1973).

14. West, *Homosexuality and Social Policy: The Case for a More Informed Approach*, *LAW & CONTEMP. PROBS.*, Winter 1988, at 181.

15. *Id.* at 187.

16. *Id.* at 199.

In the case of drug abuse and other vices that require buying and selling, criminalization has important effects on the nature of the market.¹⁷ Black markets are often characterized by the use of violence to enforce contracts and to defend or expand market shares; by products of dangerously uncertain quality; and by profits to suppliers that are beyond the reach of the tax collectors. Moreover, criminal justice officials are exposed to the temptation of being corrupted by black market operators. John Dombrink's article recounts recent cases of vice-related corruption in five big city police departments, and provides a commentary on how new patterns in commercial vice and new developments in police organizations have combined to produce the corruption problems of the 1980's.¹⁸

Peter Reuter notes the increasing importance of the federal government in the effort to suppress the black market in drugs.¹⁹ This troublesome escalation of federal activity has been justified by the fact that cocaine and some other drugs are imported from abroad, and of course transported across state lines. Federal efforts have been successful in interdicting large quantities of drugs, which makes these efforts appear relatively important vis-a-vis local law enforcement efforts. However, Reuter demonstrates that the use of the quantity confiscated as an indicator of effectiveness is misleading, and produces a greatly exaggerated impression of federal effectiveness. The point is that "[d]rugs are easy to produce and difficult to distribute . . .,"²⁰ interdiction programs result in large quantities seized, but these quantities are easily replaced at that level of the distribution hierarchy. Reuter argues that the proper measure of interdiction effectiveness is not quantity, but value. Using quantity as an index of effectiveness may lead to a misallocation of resources in the effort to suppress illicit drugs.

Federal enforcement efforts against the illicit drug trade (and other forms of illegal commercial vice) were facilitated by passage of the Money Laundering Control Act of 1986.²¹ The objective of this Act is to make it difficult for criminals to conceal or enjoy the income derived from illicit transactions. The student note titled "Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime"²² argues that this Act could violate the sixth amendment rights of some defendants if it is deemed applicable to retained counsel. If attorneys are not exempted from penalties for accepting "tainted" money, then defendants

17. Moore, *Controlling Criminogenic Commodities: Drugs, Guns, and Alcohol*, in CRIME AND PUBLIC POLICY 125 (J. Wilson ed. 1983).

18. Dombrink, *The Touchables: Vice and Police Corruption in the 1980's*, LAW & CONTEMP. PROBS., Winter 1988, at 201.

19. Reuter, *Quantity Illusions and Paradoxes of Drug Interdiction: Federal Intervention into Vice Policy*, LAW & CONTEMP. PROBS., Winter 1988, at 233.

20. *Id.* at 234.

21. Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1351-1367, 100 Stat. 3207, 3218 (enacted as Title I.H. of the Anti-Drug Abuse Act of 1986 (to be codified at 18 U.S.C. §§ 981-982, 1956-1957)).

22. Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, LAW & CONTEMP. PROBS., Winter 1988, at 369.

whose assets are of suspect origin may have difficulty in hiring the attorneys of their choice. Although the United States Department of Justice asserts that the Act was meant to include attorneys, it must be construed to exempt bona fide representation fees if it is to be constitutional.

IV

PUBLIC POLICY

The criminal law is a cumbersome, costly tool to wield against the harms associated with vice. Fortunately, there are many alternative responses.²³ In the case of drug abuse, one alternative is to treat addiction as a medical problem, and attempt to minimize the harmful consequences of addiction by bringing addicts under the care of a doctor. Trevor Bennett's account of the "British System" indicates that Great Britain's doctors were the primary caretakers of addicts until 1968, and that the typical approach was to prescribe maintenance doses of heroin or morphine.²⁴ The goal of medical treatment evolved during the 1960's and 1970's, partly in response to a rapid increase in the addict population. As in the United States, special clinics were opened that strived to wean addicts from heroin use, in part through the use of methadone. Interestingly, the advent of AIDS has motivated a partial return to the more liberal approach of the 1950's, with regular users given free needles and free supplies of methadone or heroin.

In the United States, intensifying concerns about drug abuse have resulted in the increasingly widespread use of drug testing by employers. In "Drug Testing and Public Employment: Toward a Rational Application of the Fourth Amendment,"²⁵ James Felman and Christopher Petrini report that 40 percent of the Fortune 500 companies have instituted urinalysis programs (most commonly in the context of application for employment). In the public sector, the military services have led the way in instituting urinalysis to screen for and deter illicit drug use; the question now is whether large scale screening programs will be imposed on civilian government workers. Felman and Petrini conclude that the cost of such programs may outweigh the benefits, given the intrusiveness of this type of "search" and the high rate of false positives from standard testing procedures. They conclude that "while the use of illegal drugs is a serious problem, subjecting public employees to random urinalysis is not the solution."

Mark Kleiman's article provides a comprehensive assessment of alternative policies to slow the rapid spread of AIDS.²⁶ This disease is closely linked to vice, a fact that creates political resistance to adoption of policies that may be

23. Schelling, *Whose Business is Good Behavior?*, in *AMERICAN SOCIETY: PUBLIC AND PRIVATE RESPONSIBILITIES* 153 (W. Knowlton & R. Zeckhauser eds. 1986).

24. Bennett, *The British Experience with Heroin Regulation*, *LAW & CONTEMP. PROBS.*, Winter 1988, at 299.

25. Felman & Petrini, *Drug Testing and Public Employment: Toward a Rational Application of the Fourth Amendment*, *LAW & CONTEMP. PROBS.*, Winter 1988, at 253.

26. Kleiman, *AIDS, Vice, and Public Policy*, *LAW & CONTEMP. PROBS.*, Winter 1988, at 315.

effective. The exception has been the problem of protecting the blood supply from the AIDS virus; as Kleiman notes, “[T]hose measures are largely noncontroversial, because virtually no one considered giving blood a personal right, nor receiving blood a vice.”²⁷ In other areas, measures that promise to reduce the spread of AIDS often face political difficulties because their adoption would give the appearance of condoning or encouraging objectionable activities. The British practice of passing out free needles and heroin to addicts is an extreme example, and there are others associated with the “safe sex” movement. Kleiman discusses a number of other possibilities, such as segregating seropositive prisoners, and testing prostitutes for AIDS when they are arrested. The enormous threat posed by AIDS should reorient priorities in the official response to vice.

The articles in this symposium illuminate the main issues pertinent to the definition and regulation of vice. Needless to say, the questions are not easy: Which of the claims concerning harmful consequences of the various vices are valid? Which of the consequences are properly of public concern? Given justifiable concern, what are the potentially effective policy options? If the vice is within the domain of the criminal law, which enforcement strategies are likely to be successful in reducing participation without infringing on basic rights or engendering corruption of the enforcement apparatus? And finally, in this realm of moralism and symbolic politics, intense minorities and shifting majorities, frightening allegations and empirical ambiguities, what are the principles appropriate for structuring and delimiting the policymaking process? In what follows these questions are addressed from the perspectives of law, philosophy, social science, and economics, each providing useful insight, each with its own virtues in understanding this difficult subject.

27. *Id.* at 339.

